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No. 11

In the Supreme Court of the United States

October Term, 1952

Federal Trade Commission, *Petitioner*

v.

Minneapolis-Honeywell Regulator Company

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE FEDERAL TRADE COMMISSION

CITATIONS

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OPINION BELOW

The opinion of the court of appeals (R. 2308) is reported at 191 F. 2d 786.

JURISDICTION

The "Final Decree" of the court of appeals was entered on September 18, 1951 (R. 2316-2319). Respondent's contention that an earlier order

entered on July 5, 1951, was the judgment of the court of appeals is considered in Point I, *infra*, pp. 34-47. The petition for a writ of certiorari was filed on December 14, 1951, and was granted on March 3, 1952. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petition for the writ of certiorari was filed in time.[1]

2. Whether there is sufficient evidence to support the Federal Trade Commission's finding that the three low-priced brackets of respondent's quantity discount system, which were unjustified by differences in costs, were, or tended to be, injurious to customer and competitor competition.

3. Whether a reviewing court is justified in setting aside findings of fact by an administrative agency because of the reviewing court's conclusion that contrary findings recommended by the trial examiner are supported by substantial evidence or by a preponderance of the evidence.

4. Whether a quantity discount system, the prices of which are fixed in part as a result of consideration of competitive prices but not to meet the low price of any individual competitor, is

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[1] This question was raised by respondent in its brief in opposition (p. 2). In its order granting the writ, the Court requested counsel to discuss the question in briefs and on oral argument.

justified as made "in good faith to meet an equally low price of a competitor," within the meaning of the Robinson-Patman Act.

STATUTES INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or

quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

28 U.S.C., Supp. V, 2101(c) provides as follows:

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. * * *

STATEMENT

The Nature of the Case

This proceeding was instituted by a complaint issued by the Federal Trade Commission on February 23 1943, charging respondent with violations of Section 2(a) and 3 of the Clayton Act, and Section 5 of the Federal Trade Commission Act (R. 2-12). Respondent is one of the country's principal manufacturers of automatic temperature controls used in oil burners (R. 2241). Count I alleged that, in violation of Section 5 of the Federal Trade Commission Act, respondent entered into written contracts with its customers whereunder the latter agreed to purchase all or a majority of their control requirements from respondent, and that respondent sold combustion stoker switches to its customers under so-called exclusive license agreements whereby the customers were required to purchase other devices manufactured by respondent. Count II alleged that in violation of Section 3 of the Clayton Act respondent has sold its automatic temperature controls on the condition that the purchaser should not deal in or use the controls of competitors. Count III of the complaint—the part at issue in this case—alleged that respondent's quantity discount pricing system resulted in price discriminations whose effect "has been or may be substantially to lessen competition in the line of commerce in which respondent is engaged and to injure, destroy and

prevent competition" between respondent and its competitors, and among respondent's customers, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13) (R. 10).

Respondent filed an answer admitting the existence of the quantity discount system, but denying that its effect was to lessen, injure, destroy or prevent competition (R. 22-26). Respondent further alleged that the price differentials reflected differences in costs of manufacture, sale and delivery (R. 25), and that in almost all cases the prices charged by it to oil burner manufacturers were greater than the prices at which they purchased controls from respondent's competitors (*ibid.*).

Following extensive administrative proceeding—protracted hearings before a trial examiner (R. 29-1640),[2] recommended findings by the examiner (R. 2166-2203), exceptions thereto (R. 2204-2239), briefs, and oral argument before the Commission (R. 2240)—the Commission on January 14, 1948, issued its findings, opinion and order in the case (R. 2239-2276). With respect to Count III, the Commission found, contrary to the examiner's conclusion, that the price differentials substantially injured competition between re-

[2] Prior to the convening of the hearings, a number of facts were stipulated between the Commission and respondent (Comm. Ex. 1, R. 1643-1661).

spondent and its competitors, and among its customers (R. 2256, 2260). It further found that the differentials were justified by cost differences only in the four highest of respondent's seven price brackets (R. 2254), and that the differentials in the three lowest price brackets had not been made in good faith to meet an equally low price of a competitor (R. 2257-60).[3] The Commission accordingly ordered respondent to cease and desist, *inter alia,* from giving discriminatory prices not justified by cost differentials (R. 2264).[4]

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[3] Respondent conceded that its cost study did not establish that the price differentials in the three lowest price brackets were justified by cost differences (R. 1261, 1332, 1389). It contended, however, that the differentials in those brackets were the result of meeting competition (R. 2257).

In rejecting respondent's claim that the three lowest price brackets were justified to meet competition, the Commission pointed out that these brackets did not "represent prices made in particular instances to meet competitors' prices, but reflect progressive reductions in a comprehensive price schedule based on increased quantity purchases" (R. 2272). On the question of whether the off-scale prices had been made to meet competition, the Commission noted that this justification was presented as to only 22 of the 76 off-scale accounts (R. 2257-8); that not all the 22 accounts were in the three lowest brackets (R. 2258); and that the prices given to several of the 22 accounts did not involve meeting a competitor's price at all (R. 2258-9). The Commission further found that even if respondent had met a competitor's lower price in the 22 accounts, that fact would not justify respondent's general practice of allowing off-scale prices (R. 2259).

[4] Commissioner Mason, dissenting in part, was of the view that respondent's discriminatory pricing practices had not tended to substantially lessen, injure, prevent or destroy competition (R. 2276-2282).

The cease and desist order also covered violations charged in Counts I and II (R. 2263-2264). Respondent petitioned to review and set aside all three counts of the Commission's order (R. 2283), and the Commission filed a cross-petition to enforce the order (R. 2317). The Court of Appeals affirmed the parts of the order based on Counts I and II; prior to the argument in the Court of Appeals respondent had abandoned its challenge to these parts of the order (R. 2317). The court set aside that portion of the order based upon Count III (R. 2316-18). (Further details as to the precise nature of the court's order, relevant only in relation to the timeliness of the Commission's petition for certiorari, appear in Point I, *infra*, pp. 34-37.) The court held that the Commission's findings that respondent's discriminatory pricing practices had injured or tended to injure competition among respondent's customers, or between it and its competitors, were not supported by substantial evidence (R. 2315). It did not find it necessary to pass upon the other question raised by respondent, whether the discriminatory prices were made in good faith to meet the prices of competitors (R. 2315).

The Conduct of Respondent's Business and the Operation of Its Quantity Discount Pricing System.

The underlying facts relating to the conduct of respondent's business and the operation of its quantity discount pricing system—as found by

the Commission and accepted by the court below—are not in dispute.

Respondent is the country's principal manufacturer of automatic temperature controls (R. 2241). These controls, which constitute an important item in oil burners, are sold by respondent to manufacturers of such burners, and to wholesalers, contractors and dealers in burners and automatic temperature controls (*ibid.*). "The large majority of oil burner manufacturers" do not actually fabricate the burner, but merely purchase the component parts and assemble the burner therefrom (R. 2182, 580, 594-596, 725-6, 1000). The controls generally, although not necessarily, are sold in sets of three[5] (R. 2242), and a set of controls represents the principal cost item among the various parts used in making the burner (R. 2252), costing almost twice as much as

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[5] The three controls ordinarily used in connection with domestic oil burners are a room thermostat, a primary control, and a limit control (R. 2242). The thermostat, which is placed in the area to be heated, starts the burner when the temperature in that area falls below the fixed point (R. 426, 1646). The primary control starts and stops the oil burner's operating cycle (R. 426-427, 1646). The limit control cuts off the burner whenever the temperature or pressure rises above the safety level (R. 427, 1646).

Although some controls made by different manufacturers can be and have been combined to form a set (R. 429, 596-8, 1141), the "usual trade practice" is for an oil burner manufacturer to purchase the three controls in a set from a single manufacturer (R. 228). Servicing of the burner is thereby simplified (*ibid.*). Moreover, certain controls made by different manufacturers cannot be "mixed" (R. 1066).

any other part (R. 1000). The cost of the controls may constitute as much as 40% of the total material cost and sometimes is as much as "one-third the selling price" of the completed burner (R. 634, 940-944, 1000, 2252).[6]

Respondent, since its organization in 1927,[7] has manufactured and sold "the greater part" of the automatic temperature controls used in the United States (R. 2241). It was stipulated that in 1939, 1940 and 1941 it sold approximately 60% of all such controls sold in this country to oil burner manufacturers and dealers (R. 1645).[8] As a result of substantial advertising expenditures—aggregating approximately $4,000,000 during the years 1927 to 1941 (R. 2242)—respondent has developed a large customer demand for and public

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[6] In 1941 the lowest price for respondent's controls, bracket 5, $13.75 (R. 1659), was slightly more than one-third the lowest price for burners, $40 (R. 507, 684) and 27.5% of the moderately low price of $50 (R. 505, 2141). The price in bracket 1, $17.35 (R. 1659) was over one-third of $50, and 24.8% of $70, a reasonably high priced burner. The percentage would, of course, be less for the higher priced burners. The exact percentage—whether 20, 25, 30 or 35—is, of course, unimportant. The significant fact is that the controls represented a substantial portion of the selling price of the complete burner.

[7] Respondent was formed by the combination of the Minneapolis Heat Regulator Company, which had been making heat regulator devices since 1885, and the Honeywell Heating Specialties Company, which had been organized in 1906 (R. 2309).

[8] In 1937-38 respondent had 73% of the controls business (R. 2312).

acceptance of its controls (R. 2242, 866, 995, 1046, 1108). Most oil burner manufacturers were accordingly impelled to supply burners with respondent's controls, either as standard or optional equipment (R. 364, 429, 441, 473, 628, 648, 664, 685-686, 715, 728, 974-975, 995, 1045-1046, 1108, 1136-1137, 1141).[9] In consequence, respondent has been able to sell its controls at higher prices than its competitors; in many instances oil burners equipped with respondent's controls have been sold for $2.50 to $5.00 more than the same burners equipped with controls made by its competitors (R. 2242).[10] The temperature control business is

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[9] For example:

> A. In our particular field as we catered chiefly to builders, that you will understand it, we had to supply Minneapolis-Honeywell controls. They would not have anything else. [R. 628.]
>
> * * * *
>
> Q. I mean did every example of higher priced burners carry always Minneapolis-Honeywell controls?
>
> A. Most of the burners carried Minneapolis. [R. 715.]

One manufacturer who preferred Merçoid controls also had to sell burners with Minneapolis-Honeywell controls, since "Some dealers would not take burners without Minneapolis-Honeywell controls" (R. 728). It was stipulated that between 1936 and 1941 "more than 50% of all the manufacturers of oil burners within the United States" "entered into annual contracts" with respondent (R. 1645). There was testimony that some companies purchased from respondent without entering into annual contracts (R. 926-927, 2253).

[10] In some instances, the higher price of respondent's controls was passed on by the manufacturer to his dealers (R.

keenly competitive (R. 394-396, 749, 801-802).[11]

During the period 1937 through 1941 the prices charged by respondent to oil burner manufacturers were based upon a standard quantity discount pricing system (R. 2250-2252). Under this system, the prices paid by purchasers of 50 or more sets of controls annually varied according to the number of sets purchased.[12] The net prices decreased as the quantity purchased increased. During 1941 respondent had the following price brackets (R. 2252):

Bracket No.	No. of Sets	Net Price Per Set	Discount from Highest Price
1	50-349	$17.35	....
2	350-999	16.45	5.19%
3	1000-2499	15.90	8.36
3A	2500-4999	15.35	11.33
4	5000-7499	14.90	14.12
4A	7500-9999	14.25	17.87
5	10000-up	13.75	23.05

364-365, 1150-1151). [a] Other manufacturers absorbed the higher cost of respondent's controls, thereby cutting down on their profit margin (R. 936, 942, 975).

[11] Respondent's principal competitors during the period involved in this case were the Penn-Electric Switch Company, the Mercoid Corporation, and the Perfex Corporation (R. 2242, 2309). Mercoid entered the controls business in 1922, Penn-Electric in 1932, and Perfex in 1936 (R. 2309). The prices charged by these three companies for controls were generally lower than those charged by respondent (R. 76-77, 2312).

[12] Purchasers of less than 50 sets annually were not recognized by respondent as oil burner manufacturers, and they did not receive the benefit of the discount bracket prices (R. 2250). In 1941, they paid $20.25 per set of controls as against the bracket prices of $17.35 to $13.75 (R. 2253).

Approximately 55% of respondent's total control sales in 1941 were to customers in the three lowest price brackets (brackets 4, 4A, 5) (R. 1630-1631), for which the Commission found the differentials not to be justified by differences in costs (R. 2255). However, in that year only twenty-two of respondent's 150-200 oil burner manufacturer customers (R. 1132) were in those brackets. Ten received bracket 4 prices (R. 1431), one had a 4A price (R. 1433), and eleven were given the lowest (5) price (*ibid.*).

Respondent's practice has been to execute annual contracts covering customer purchases for the following year (R. 1496, 2243). These contracts, generally executed in December or January (*ibid.*), placed the customer in a price bracket based upon respondent's estimate of the customer's prospective purchases. A particular customer's bracket was determined by its purchases during the preceding year, the average of the purchases of two or more preceding years, or the customer's estimate of its probable purchases (R. 2253). Although respondent endeavored to execute contracts with its customers, bracket prices based upon anticipated purchases were given to some customers who did not sign a contract (R. 926-927, 2253).

If a customer's total purchases exceeded the contract figure so as to bring the purchaser into a

lower price bracket, he was given the benefit of such lower price by retroactive discounts or credits (R. 927-8, 1497, 2253). However, if a customer failed to purchase the specified quantity, the price was not increased to the higher level which compliance with the quantity bracket scale would have required (*ibid.*). A number of customers were thus placed in brackets lower than their volume of purchases entitled them. These were known as "off scale sales" (R. 2254).[13] In 1941, 76 out of respondent's 150-200 customers (R. 1132) were "off-scale" accounts (R. 1496, 2256).[14] At least four of these "off scale" accounts resulted from a practice of respondent's known as "dual transactions" (R. 1550, 2257). That was an arrangement whereby an oil burner manufacturer who sold burners without controls to a furnace manufacturer was given credit, in determining his price bracket, for controls purchased by such furnace

[13] Some of these "off-scale" sales were made to meet a competitive situation where it appeared unlikely that the buyer would be able to purchase the quantity called for by the bracket price it was given. For example, respondent gave the May Oil Burner Corporation its lowest price in 1941—bracket 5 calling for 30,000 units at $13.75 a set of three units—because it "knew that any of our competition * * * would give them their lowest bracket" (R. 1620). May's actual purchase of 14,000 units, however, would have entitled it only to a 3-A bracket price of $15.35 (*ibid.*; R. 2252).

[14] A cost study made by respondent showed that approximately 43% of its total manufacturing costs in 1941 was applicable to off-scale customers (R. 1423, 2254).

manufacturer directly from respondent (R. 929-931, 2257).[15]

Injury to Customer Competition.

The Commission's finding of injury to *customer* competition was grounded upon findings that the question of price was important to oil burner manufacturers in the purchase of controls (R. 2260); that a set of controls represents the largest single item of cost among the various parts of a finished oil burner (R. 2252); that oil burner manufacturers who received the lower prices had a "substantial advantage" over their competitors paying the higher prices (R. 2255); and that the latter "must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent charge for oil burners equipped with respondent's automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales" (*ibid.*).

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[15] An example of such a dual transaction was the Automatic Burner Corporation account. In 1940 that company was given a 4A contract calling for 22,500 instruments (7,500 sets). Its actual purchases during that year were only 15,739. However, one of its customers purchased directly from respondent 15,129 units for use with ABC burners. Automatic Burner was thus given credit for 30,868 instruments. This resulted in the company's receiving a retroactive credit, and a 1941 bracket 5 contract. In 1941, Automatic Burner's direct purchases of 19,851 units were again combined with the customer's purchases of 21,315 units to give Automatic Burner a credit of 41,166 instruments (R. 1543-1544).

The record as a whole shows that these findings are supported by substantial evidence.

There was keen competition among oil burner manufacturers during the period 1937 to 1941 (R. 658-9, 713, 992, 1071, 1179). Manufacturers generally fell into two categories: those selling a more expensive burner, and those marketing a cheaper product (R. 452-3, 992, 1135-6, 1152). In 1941, the selling price to dealers of the higher priced burners generally was in the $60 to $75 range (R. 453, 459, 1086, 1113), although a number of manufacturers sold at substantially higher prices which went as high as $114.50 (Resp. Ex. 171, R. 2141; cf. R. 997, 1003). The low priced burner usually fell into the $40 to $50 range (Resp. Ex. 171, R. 2141; R. 453, 505, 507, 684, 1071). The manufacturers of the higher priced burners emphasized quality and service (R. 997, 1044-5, 1153-4). Although a number of firms continued to sell a comparatively expensive burner during the period 1937 to 1941,[16] many others were forced to meet competitive prices to stay in business (R. 459-460, 535, 537, 579, 659).

[16] Some of these manufacturers testified that, because of their emphasis on quality and service, they could continue to sell a higher priced burner despite competition, and that accordingly their sales of burners were not injured by the fact that other manufacturers were paying lower prices for controls (R. 997, 999, 1086, 1087, 1141, 1142, 1151). One of these firms, however, admittedly lost a customer to Quiet-Heet, which received lower control prices "because of the price" (R. 1155).

Two of the principal manufacturers in the low priced class were the Aldrich Company and the Quiet-Heet Manufacturing Corporation (R. 455). Both of these companies began business in the mid 1930's, and enjoyed a rapid growth. Aldrich was organized in 1935 (R. 1057). In its first year of operation it manufactured 250 burners; by 1941 its output had increased to 20,000 (R. 1059). During the same period, Aldrich went from respondent's highest price bracket (1) in 1936 to its lowest price bracket (5) in 1941 (R. 1070). Its first burner was sold to dealers for $82.50, and the price was steadily reduced until in 1941 it reached $47.50 for large quantities (R. 1071-1072, 1080).

Quiet-Heet was organized in 1936 (R. 495). In 1937 it manufactured 7500 burners; by 1941 the number had increased to 25,000 (R. 496). From the outset, Quiet-Heet emphasized its low price. Operating on a volume basis, it cut manufacturing and distribution costs by eliminating service, sales on credit, a large sales force, and extensive advertising (R. 569-572). In 1936, when it put its first burner on the market at $70 to dealers (R. 504), it was in respondent's highest price bracket (R. 554). Quiet-Heet steadily reduced the price of its burner, and by 1941 it reached a low of $40 to $50 (R. 505, 507, 684). At the same time, the prices paid by Quiet-Heet for respondent's controls dropped sharply. In 1937 and 1938 Quiet-Heet was in respondent's next-to-lowest bracket; thereafter it re-

ceived respondent's lowest prices (Resp. Ex. 185-E, R. 2164; R. 1007-1008, 2251). Quiet-Heet's advertising material emphasized that its burner included respondent's controls (Comm. Exs. 124-125, R. 1871, 1873).

The competition of these low priced manufacturers beginning around 1936 quickly drove the market price of the cheaper burners down (R. 588, 713-714); during the first six months of such competition the price went down "at least $25.00" (R. 579). A number of burner manufacturers lost business to Quiet-Heet (R. 630-631, 639, 658-659, 990, 1126, 1155). One manufacturer, in fact, was unable to meet competition at the prices he was paying respondent for controls (R. 681), so he purchased from Quiet-Heet complete burners which were equipped with respondent's controls, removed the controls, and used them on its own burners (R. 683, 690, 693).

Respondent introduced a tabulation of the results of a survey of oil burner prices in 1941 (Resp. Ex. 171, R. 2133). This survey revealed wide variations in the prices at which burners were sold to dealers in different areas, and showed that in some instances the highest prices were charged by oil burner manufacturers who paid respondent's lowest prices, and *vice versa*. The tabulation, however, merely showed the high and low prices, and did not endeavor to determine the average or median price (See n. 38, p. 64, *infra*).

Although this survey indicated that in some instances there appeared to be no direct correlation between the prices paid for the controls and the selling prices of the burners, it also showed that in 11 of the 15 areas surveyed the lowest dealer price was given by manufacturers in respondent's lowest price bracket (Resp. Ex. 171, R. 2141); see also n. 38, p. 64, *infra*. Moreover, there was direct evidence in the record linking changes in prices charged by respondent for controls to changes in the price of the complete burner.

Thus in 1936 Williams Oil-O-Matic Corporation charged $2.50 more for burners equipped with respondent's controls than for those with Penn-Electric or Mercoid (R. 965, 1035, 1037). In 1937, after respondent had increased the price charged Williams (R. 123-124, 965), the latter in turn increased the extra charge for burners with respondent's controls from $2.50 to $7.50 (*ibid.*, R. 1036). In 1938 Williams received respondent's lowest price of $16.25 (R. 123, 124, 2251)—$5.05 less than it had paid the previous year (Resp. Ex. 185-F, R. 2165; R. 2251). It then reduced the additional charge back to $2.50 (R. 965, 1036). During the period when the $7.50 differential was in effect, many of Williams' dealers, despite their preference for respondent's controls, selected burners with one of the cheaper makes (R. 1046). When Williams reduced the differential to $2.50 the following year, and ultimately eliminated it, a

"greater number" of dealers again selected burners with respondent's controls (R. 1047).

The Penn Boiler and Burner Company, unable to meet competition at the prices it paid respondent for controls (R. 681), purchased from Quiet-Heet complete burners equipped with respondent's controls, removed the controls, and used them on its own burners (R. 683, 690, 693). By so doing the company was able to sell burners equipped with respondent's controls for only $4 more than burners equipped with other controls (R. 685). If the company had purchased directly from respondent and paid the higher prices, it would have had to charge $6 more (*ibid.*).[17]

In its opinion the Commission rejected respondent's argument, based upon the tabulation of high and low prices, that an absence of injury to customer competition was shown by the wide variations in price among oil burners, and by the fact that the highest prices are sometimes charged by oil burner manufacturers who paid respondent's lowest prices for controls (R. 2274). The Commission further stated that the fact that manufacturers may also have received discounts on other component parts of oil burners, and that the whole competitive effect could not be traced solely to respondent, did not relieve respondent of its "real

[17] Some manufacturers had to sell burners to their dealers without controls because the dealers were able to purchase controls directly in the open market for less than the manufacturer could sell them with the burner (R. 527, 540, 578-9).

and substantial" share of responsibility (R. 2275). For, as the Commission pointed out, "Each seller who may have contributed to the aggregate price or cost advantages obtained by the favored burner manufacturers is, in part, responsible for the aggregate competitive result" (*ibid.*). The Commission also rejected respondent's argument that competition was not injured because other controls were available at lower prices. It stated that there was a substantial demand for respondent's controls, and that furnace and oil burner manufacturers had to be able to supply them "in order to be competitive" (*ibid.*).

Injury to Competitor Competition.

The Commission's finding of injury to competition among respondent's *competitors* rested on the finding that the price discriminations had induced oil burner manufacturers to purchase respondent's controls and had thus diverted trade to respondent from its competitors (R. 2256). In its accompanying opinion the Commission noted that respondent's pricing practices encouraged customers to concentrate their purchases in a single source of supply rather than distributing their business among competitors, and concluded that the "very nature" of quantity discounts perforce diverted business to the seller granting such differentials (R. 2274). The Commission rejected the argument relied on by the court below (*infra*, p. 25), that the growth of business among respondent's

competitors and respondent's own relative decline in the industry—from approximately 73% in 1937 to about 60% in 1939-1941—showed that competition had not been injured (R. 2273). The Commission pointed out that "* * * the law does not permit respondent to resort to unfair or discriminatory practices in order to maintain its competitive position in the industry" (R. 2273), and that competition was adversely affected under the Act whether the discriminatory practices resulted in the retention of old business or the securing of new customers (*ibid.*).

The record shows that price was an important consideration to many burner manufacturers in determining from whom they purchased their controls (e.g., R. 374, 593, 786)[18] and that some manufacturers gave respondent's competitors less business in order that they might be granted a larger discount on respondent's controls. Thus, Mercoid was unable to sell the Automatic Burner Corporation because it would "cost money" for the latter if it had failed to purchase a sufficient quantity of respondent's controls to obtain a retroactive credit (R. 150-151, 984). Mercoid similarly lost most of the Cleveland Steel Products Corporation's business to respondent in 1938 and 1939 (R. 153-154);

[18] One manufacturer, for example, testified that "price would be quite an important factor" in determining whether it would purchase controls from Perfex or from respondent (R. 374).

in the latter year Cleveland Steel informed respondent that because Cleveland's 1940 prices would be equal to the lowest in the industry, Cleveland was anticipating giving respondent all of its business (Gov. Ex. 107-B, R. 1854-1855).

Penn Electric Switch Company, another competitor of respondent, similarly lost a considerable volume of the business of customers given the advantages of respondent's lower discounts. Penn Switch's percentage of the business of the Williams Oil-O-Matic Corporation dropped from 77.28% in 1938 to 42.58% in 1941 (Resp. Ex. 126-A, R. 2037-38). During the same period, when respondent gave Williams Oil-O-Matic its lowest price, although not justified by volume (R. 965-968), respondent's percentage increased from 13.16% to 43.24% (Resp. Ex. 126-A; R. 2037-38). Micro-Westco, which respondent had lost to Penn Switch in 1938 (R. 970) following an increase in price (R. 969), was regained by respondent in 1940 after giving it the lowest price (R. 970).

There was also evidence, relied on by the trial examiner (R. 2193-2194) and the court of appeals (R. 2312), that in 1941 respondent lost to competitors varying proportions of the control business of 31 accounts that previously had standardized on respondent's controls and given respondent a "preponderance of their business" (R. 961-964). The percentage of business thus lost ranged from 5% to 95% for particular customers

(*ibid.*). The 31 accounts gave respondent's competitors 53% of their business in 1941 (R. 964). This evidence shows that some customers were induced to purchase from respondent's competitors, presumably because of their lower prices. There were compensating gains to respondent, however, as the evidence summarized (*supra*, pp. 22-23) demonstrates. Respondent not only retained its 60% share of the national market (R. 1645),[19] but increased its sales of controls to burner manufacturers 25% between 1939 and 1941 and 13.6% between 1940 and 1941 (R. 877).

The Decision of the Court of Appeals[20]

In rejecting the Commission's findings of injury to *customer* competition, the court of appeals relied primarily on its conclusion that there was an "absence of causal connection" between the prices which particular manufacturers paid for controls and the prices at which they sold the finished burners (R. 2313, 2314). The court further held that since the controls constituted only one factor that went to determine the cost of burners, the "discriminatory price differentials" could not be said substantially to injure competition or create "any reasonable probability or even possibility" thereof (R. 2315).

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[19] It was stipulated that the percentage was approximately 60% during 1939, 1940 *and* 1941 (R. 1645).

[20] The facts relating to the date of the court's judgment are set forth in the Argument in the discussion of the timeliness of the filing of the petition (*infra*, pp. 34-47).

On the question of injury to *competitor* competition, the court held that since respondent's competitors "were able to enter its field and build thriving businesses in spite of M-H's commanding position and alleged wrongful practices," the effect of such practices could not be said "substantially to injure competition" (R. 2312). Prior to discussing the evidence on this aspect of the case, the court stated that from its examination of the "record as a whole" it was "convinced that the findings of the examiner were supported by very substantial evidence" (R. 2311). After summarizing certain "undisputed facts" as to the effect of respondent's practices on competitor competition,[21] the court held that such facts "fully establish the examiner's finding that competitor competition was not injured," and "outweigh the facts relied upon by the

[21] The facts referred to by the court were: that respondent's competitors generally charged lower prices for controls than respondent, and that there was no evidence that respondent had undercut its competitors; that during the period covered by the complaint there existed the "keenest kind of price competition" among control manufacturers; that the total business of respondent's competitors increased, and that the sales volume of the three new concerns which entered the industry after 1932 grew steadily; that respondent's share of the control business decreased from 73% in 1937-1938 to 60% in 1941; that in 1941 respondent lost to competitors 53% of the control business of 31 customers who previously had standardized on respondent's controls; and that in the same year 126 other customers of respondent also purchased controls from competitors (R. 2312).

Commission in reaching the opposite conclusion" (R. 2312). The court concluded that (*ibid.*)

> while the findings of an examiner are not "as unassailable as a master's" (*Universal Camera Co.* v. *National Labor Relations Board*, 340 U.S. 474, 492), where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary.

In view of its conclusion that respondent's pricing practices did not injure competition, the court did not reach the question whether the discounts in the three lowest price brackets, and the off-scale sales, had been made in good faith to meet an equally low price of a competitor (R. 2315).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred—

(1) In holding that the Commission erred in finding that the effect of respondent's quantity discount pricing system was substantially to lessen or to prevent competition between respondent and its competitors, or among its customers.

(2) In substituting its judgment for that of the Commission as to the effects upon competition of respondent's quantity discount pricing system.

(3) In holding that proof of injury to customer competition required a showing of causal relation-

ship between the seller's discriminatory prices and its customers' prices, and in failing to hold that a finding of injury to customer competition was adequately supported by evidence that substantial price discriminations were given by the seller among customers who were competing with each other.

(4) In holding that the Commission acted arbitrarily in rejecting the trial examiner's recommended findings, and that an examiner's findings which the reviewing court believes to be supported by the preponderance of the evidence are binding upon the Commission.

(5) In reversing Part III of the Commission's order and dismissing Count III of the Commission's complaint.

SUMMARY OF ARGUMENT

I

The petition for a writ of certiorari, filed within 90 days after the court of appeals entered its "Final Decree" on September 18, 1951, was timely. The court's earlier order of July 5, 1951, which related only to Part III of the Federal Trade Commission's cease and desist order and was silent concerning Parts I and II, was not the court's final order in the case. The entire controversy was not finally determined until the court entered the September judgment which dealt with Parts I, II and III.

Both the all-inclusive provisions of the September judgment and its title show that the court obviously intended it to supersede the earlier incomplete judgment. Since the court below had undoubted power to vacate the original judgment and enter a new one, its intention as to which order is its final judgment is controlling. *Rubber Company* v. *Goodyear*, 6 Wall. 153; *United States* v. *Hark*, 320 U.S. 531. The fact that the September judgment did not change the provisions relating to Part III in the July judgment is immaterial, since the entry of a new judgment supersedes the old even if there is no change of substance. *Rubber Company* v. *Goodyear, supra; Memphis* v. *Brown*, 94 U. S. 715. It is the established rule in this country that an amended judgment extends the time to appeal. Moreover, even an untimely petition to amend in matters of substance, if "considered on its merits," tolls the time for appeal from the entire judgment (not merely from the portion sought to be changed) until the court acts on it. *Bowman* v. *Loperena*, 311 U.S. 262, 266. The Commission's application in this case induced the court to revise the judgment in important respects, and thereby extended the time for appeal. To treat the July judgment as the final one with respect to Part III of the Commission's order would contravene the policy against separate and piecemeal appeals in a single controversy.

II

A. Section 2(a) of the Clayton Act prohibits a seller from discriminating in price between competing purchasers where the effect of such discrimination "may be substantially" to lessen or injure competition with its customers or among its competitors. The Act does not require a showing that the price discriminations actually have injured competition; it is enough that there be a reasonable possibility or reasonable probability of such injury. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37. The evidence in this case clearly meets the standard of either reasonable possibility or reasonable probability. The court below erred because it weighed the evidence to determine whether actual injury to competition had been shown.

B. It is undisputed (1) that respondent charges some oil burner manufacturers substantially lower prices for its automatic temperature controls than it does other manufacturers, and that such discriminations are not justified by cost differentials; (2) that the controls are the most expensive part of an ~~oil bur~~ner, often constituting as much as one-third of the total cost; (3) that the oil burner manufacturers who receive the unjustified discounts are in competition with manufacturers who do not; (4) that respondent

sells 60% of the automatic temperature controls sold in the United States; and (5) that the demand for respondent's product makes it necessary for most oil burner manufacturers to stock respondent's controls, at least as optional equipment. This showing "in itself is sufficient" to support the Commission's "obvious" inference of injury to customer competition. *Federal Trade Commission* v. *Morton Salt Co., supra.* Respondent has not shown that its particular industry is so unique that the substantial differentials given to competing customers do not create a reasonable possibility or probability of injury to competition. Respondent's dominant position in the controls industry demonstrates that its price discriminations are even more likely to injure competition than in an industry—such as the salt business in *Morton Salt*—where no single producer controls the major share of the market.

Respondent's discriminatory discounts on the controls were as substantial, even in relation to the price of finished oil burners, as the discounts condemned by this Court in the *Morton Salt* and *Corn Products* cases. The facts that controls constituted only one of the parts used in constructing an oil burner (although the most expensive part) and that many other things affect burner prices do not negate the Commission's finding of injury to competition. Respondent's contrary argument would lead to the conclusion that a manufacturer

of an assembled product could receive unjustified discounts on all of the parts used, and thereby gain a large competitive advantage, since no one of the discounts could be proved substantially to affect competition in the completed product. A similar argument was rejected in the *Morton Salt* case, 334 U.S., at 49.

Nor does the fact that some high price burner manufacturers paid less for controls and *vice versa* prove that the discounts did not give the recipients, who fought very hard for them, a competitive advantage. It shows only that particular manufacturers may have had compensating advantages because of other factors and methods of operation. It still remains true that manufacturers paying more for controls would have been in a better competitive position if they had paid less; they would have been able either to reduce prices or to use their greater net revenues for other purposes. Similarly, the testimony of some oil burner manufacturers that they were not injured by the discrimination because of compensating advantages in their particular cases did not prove that others were not hurt, or that in general those who received greater discounts were not given a competitive advantage—as other oil burner manufacturers testified was the case. Thus, none of the facts upon which respondent relies is sufficient to preclude the Commission from reasonably drawing the obvious inference of probable or possible injury to competition.

C. The evidence clearly supported the Commission's finding of injury to competitor competition. Public demand for respondent's controls compelled most burner manufacturers to have such controls available for their burners. Since under respondent's pricing system the price of controls dropped as the volume purchased increased, the inevitable tendency of the system would be to encourage burner manufacturers to concentrate their purchases in respondent as their single source of supply. The record shows that respondent's discriminatory discounts not only created a reasonable possibility of injury to competition, but resulted in actual injury. In concluding that competitor competition had not been injured, the court of appeals singled out portions of the evidence and disregarded other evidence relied on by the Commission. In so doing, it improperly substituted its judgment for that of the Commission as to the weight of the evidence.

The court below, apparently misunderstanding *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, gave undue weight to the findings of the trial examiner that respondent's discriminatory discounts did not injure competition. Nothing in the *Universal Camera* case or the Administrative Procedure Act suggests that a reviewing court is to substitute the examiner's decision for that of the agency whenever it concludes that the examiner's recommended find-

ings are supported by substantial evidence or by a preponderance of the evidence. For this would mean that the court would be weighing the evidence *de novo* whenever an agency reversed its examiner. Such weighing of the evidence and the drawing of inferences therefrom are for the Commission, not the courts. The Commission's decisional process here did not require the resolution of testimonial conflicts, where the examiner's opportunity to appraise the credibility of witnesses entitles his recommendations to substantial significance, but the drawing of economic inferences as to the effect of uncontradicted facts on competition. The examiner is in no better position than the Commission to determine such matters; indeed Congress has entrusted such decisions to the Commission rather than to examiners because of its belief that the Commission would have superior expertness in the field.

III

The justification allowed by Section 2 (b) of the Clayton Act for discriminations made in good faith to meet an equally low price of a competitor permits only price discriminations made to deal with "individual competitive situations," and not to entire "pricing systems" or "a general system of competition." *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U.S. 746. The discounts under respondent's quantity discount

system, which has been in use since 1927, were fixed in relation to the general competitive picture, and not to meet individual competitive situations. As a matter of law, they cannot satisfy the requirements of Section 2(b).

ARGUMENT

I

The Petition for a Writ of Certiorari Was Filed in Time.

The "Final Decree" of the court of appeals—so captioned by the court—was entered on September 18, 1951 (R. 2316). The petition for a writ of certiorari was filed on December 14, 1951. It is undisputed that the petition was filed within 90 days of the entry of the "Final Decree" as required by 28 U.S.C., Supp. V, 2101(c).

Respondent contends however, that the judgment of the court of appeals was not the "Final Decree" of September 18, 1951, but an earlier order entered on July 5, 1951; that the petition was untimely because filed more than 90 days after entry of the latter order; and that accordingly this Court has no jurisdiction to entertain the petition (brief in opp. 1-2, 10-12). Consideration of this contention requires review of the proceedings before the court of appeals.

The Commission's cease and desist order contained three prohibitory parts (R. 2262-2264). Part I related to violation of Section 5 of the Federal Trade Commission Act; Parts II and III

dealt with violation of Sections 3 and 2(a), respectively, of the Clayton Act. Respondent's petition to review challenged the entire order (R. 2284-2298), and the Commission filed a cross-petition to affirm and enforce the entire order (R. 2317).[22] During the court proceedings, however, respondent abandoned its challenge to Parts I and II of the order (R. 2308).

On July 5, 1951, the court handed down an opinion which reversed Part III of the order (R. 2308). On the same day the court entered an order (R. 2316) which

> "ordered and adjudged * * * that Part III of the decision of the Federal Trade Commission entered in this cause on January 14, 1948, be, and the same is hereby, Reversed, and Count III of the complaint upon which it is based be, and the same is hereby Dismissed.

The court's opinion discussed only Part III of the Commission's order (R. 2308-2315). The court stated that, since respondent was not challenging Parts I and II, it would "make no further reference to them" (R. 2308), and the court's order of

[22] Although the cross-petition is not included in the printed record filed with this court, the final decree entered by the court below on September 18, 1951, recites that the Commission has filed a cross-petition praying for enforcement of the order (R. 2317). A copy of the cross-petition will be filed with the Clerk of this Court.

July 5, 1951, was similarly silent as to these Parts (R. 2316). The court thus entered no judgment with respect to those portions of the order.

Despite respondent's failure to continue its challenge to Parts I and II of the order the court was required to enter judgment with respect to their validity, not only because of the cross-petition filed by the Commission, but also because the court had the statutory duty to affirm, modify or set aside the order brought before it for review.[23] Even if respondent's abandonment of its challenge to Parts I and II were to be viewed as a *pro tanto* withdrawal of its petition to review, the entry of judgment with respect to those parts would still be necessary because of the Commission's cross-petition. Since Parts I and II of the Commission's order were not affirmed, modified or set aside by the judgment entered on July 5, 1951, this judgment was not dispositive of the review proceedings.

The Commission, being of the opinion that the court's order of July 5, 1951, had not fully disposed of the case, filed with the court a memorandum dated August 21, 1951, requesting entry of a

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[23] Section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45(c)) (under which Act Part I of the order was entered) and Section 11 of the Clayton Act (15 U.S.C. 21) both require the reviewing court to enter a judgment "affirming, modifying, or setting aside" the order of the Commission. In addition, Section 5(c) of the Trade Commission Act requires the court to enter a decree "enforcing" the order under review "to the extent that such order is affirmed."

judgment affirming and enforcing Parts I and II of its order.[24] Following the filing of an opposing memorandum by respondent and a reply thereto by the Commission, the court on September 18, 1951, entered a judgment which it captioned "Final Decree" (R. 2316). That judgment recites the prior proceedings in the case, including the cross-petition filed by the Commission (R. 2316-2317). It recites that it appears to the court that Parts I and II of the Commission's order should be "affirmed and enforced" and that Part III should be "reversed" (R. 2317). The judgment then provides: "Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed" that Part III of the order "be and the same is hereby reversed" and Count III of the complaint upon which it is based "be and the same is hereby dismissed," and that Parts I and II "be and the same hereby are affirmed" (*ibid.*). In addition, the judgment incorporates the prohibitions of Parts I and II of the Commission's order, and directs that respondent file with the Commission within 90 days a written report setting forth its compliance with the judgment. (R. 2317-2319).

1. We submit that the foregoing facts conclusively show that the court below intended that its later judgment of September 18 should supersede

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[24] The memorandum is entitled "Statement of the Position of the Federal Trade Commission Relative to Settlement of a Final Decree Herein." A copy of this memorandum, which is not a part of the record, has been filed with the Clerk.

its earlier, incomplete judgment of July 5. Otherwise the later judgment merely would have affirmed and enforced Parts I and II of the Commission's order. Instead, the September judgment not only affirmed and enforced Parts I and II, but also specifically reversed Part III. The court further manifested its intention to make the September judgment its final judgment covering the entire cause, including Part III, by denominating this judgment its "Final Decree."

The July judgment had been but a partial and incomplete disposition of the controversy. It left undetermined the judgment, if any, which was to be entered with respect to Parts I and II, a matter not settled until the court below entered its September judgment. Then—and not until then—did the court finally adjudicate the entire controversy before it.

If there is doubt as to which of two acts (or orders) of a court constitutes its final judgment, the court's intention on the matter is controlling. *Rubber Company* v. *Goodyear,* 6 Wall. 153, 155-156; *United States* v. *Hark,* 320 U.S. 531, 535; *Monarch Brewing Co.* v. *George J. Meyer Mfg. Co.,* 130 F. 2d 582 (C.A. 9). Here, as in the *Hark* case, it cannot be assumed that the court intended its final decree of September 18 which reversed Part III to be merely "an empty form" (320 U.S. at 535). Yet it would be just that if the court intended its July judgment to stand as its final judgment as

to Part III. See *Union Guardian Trust Co.* v. *Jastromb,* 47 F. 2d 689 (C.A. 6). Clearly, the court must have intended to make its September judgment its final order dispositive of the entire cause before it, including Part III.

A court has plenary power to modify or vacate its judgment at any time during the term in which the judgment was rendered. *Zimmern* v. *United States,* 298 U.S. 167, 169-170. Thus the court below could have specifically vacated the July judgment in its September order.[25] Had it done so, the September judgment plainly would govern the time for filing a petition for certiorari. *Hill* v. *Hawes,* 320 U.S. 520. No different result should follow because the court did not formally vacate the earlier judgment, where it obviously intended that the second judgment was to supersede the first. *Rubber Company* v. *Goodyear,* 6 Wall. 153; *Memphis* v. *Brown,* 94 U.S. 715, 718. In the *Goodyear* case an order had been entered on the court's minute book on November 28. On December 5 the court entered another order, captioned "final decree," which was "for the most part in the very language of the (earlier) order" and which made no changes of substance in that order. This Court held that an appeal taken from the December order

[25] The court below has one term annually, which commences on the first Tuesday in October. Rule 2, Rules of the United States Court of Appeals for the Seventh Circuit (effective August 1, 1950).

was timely because the latter order was the final order in the cause. The Court stated (pp. 155-156):

> We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree.

Moreover, the practical effect of the September judgment in the case at bar was to vacate the July judgment, and it must be viewed as so doing. Cf. *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689, 690 (C.A. 6), where the court stated:

> The order of March 18 did not expressly vacate the order of March 7, but we think it should be considered as having that effect. It covered exactly the same subject-matter, and there could have been no object in entering it, unless it was intended to supersede the earlier order.

Respondent contends that the court below intended the July judgment to "make final disposition of the case" (Br. in opp. p. 11). This may have been true in July, when the court presumably was unaware that the judgment was incomplete.

But in September it intended the new judgment to supersede the old one, as the language and title of the September judgment demonstrate. The intention at the time the second judgment was entered necessarily controls, for that determines whether the court meant to vacate and supersede the earlier one. Respondent's argument would have been equally applicable to each of the cases cited in the preceding paragraphs.

It is immaterial that the September judgment, in reversing Part III, did not substantially change the provisions relating to Part III contained in the earlier judgment. The entry of a new judgment supersedes the old even though there is no change of substance. *Rubber Company* v. *Goodyear, supra; Memphis* v. *Brown*, 94 U. S. 715; *Union Guardian Trust Co.* v. *Jastromb, supra.* In *Memphis* v. *Brown*, this Court stated (p. 718):

> the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term, and for the very purpose of giving it effect for a *supersedeas*.[26]

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[26] In the *Union Trust* case the first order was entered on the court's journal on March 7, the same day on which the court filed its opinion. On March 18 the judge signed another order which "after some recitals, was in substantially the same language as the order of March 7" (47 F. 2d 689). The court held that the March 18 order superseded the earlier one, and that an appeal taken within 30 days of the second order was timely. See *supra*, p. 40.

The same result would seem to follow *a fortiori* where the new judgment is substantially different, as it is here, even though a part of it is taken without change from the earlier decree. Where only a part of the judgment is altered, the conclusion that the new judgment stands in place of the old is reinforced by the policy against piecemeal appeals in a single lawsuit, discussed at pp. 46-47, *infra.*

It is the general rule in this country (subject to an exception for clerical or formal errors) "that where a judgment, order, or decree is amended or modified the time within which an appeal from such determination may be taken begins to run from the date of the amendment or modification." Annotation, 80 Law Ed. 1121, and cases cited. Federal cases applying the general rule include *Memphis* v. *Brown, supra; Zimmern* v. *United States, supra; Fultz* v. *Laird,* 24 F. 2d 172 (C. A. 6); *Union Guardian Trust Co,* v. *Jastromb, supra.* State cases include *Hewey* v. *Andrews,* 82 Ore. 448, 159 P. 1149; *Billson* v. *Lardner,* 67 Minn. 35, 69 N.W. 477; *Luck* v. *Hopkins,* 92 Tex. 426, 49 S.W. 360.

In the instant case the July judgment disposed of only one part of the cause before the court. The entry of the September judgment effected a substantial modification of the earlier, incomplete judgment by broadening it to cover the other two parts of the Commission's order. The cases have held that less substantial modifications of judg-

ments brought into play the general rule that modification of a judgment extends the time to appeal. In *Fultz* v. *Laird, supra,* the original judgment had provided for cancellation of an option and the award of damages; the amended judgment eliminated the damage award. In the *Jastromb* case the amended order was "a more detailed order containing certain recitals."

2. The preceding argument shows that when a court actually changes its judgment, the time to appeal or petition begins to run anew irrespective of whether a petition for rehearing has been filed.

It is also established that the timely filing of a motion to amend or modify a judgment that raises "questions of substance" as distinguished from "mere matters of form" tolls the period for taking an appeal until the court acts on the motion (*Leishman* v. *Associated Electric Co.,* 318 U. S. 203, 205; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 177), and that even an untimely petition to amend a judgment, if "entertained or * * * considered on its merits", similarly extends the time for appeal (*Bowman* v. *Loperena,* 311 U. S. 262, 266; cf. *Pfister* v. *Northern Illinois Finance Corp.,* 317 U. S. 144, 149).

In this case, the Commission's application was not filed within the 15 days allowed for petitions for rehearing. But it did induce the court to revise the judgment in matters of substance, and thus was obviously "entertained" and "consid-

ered on its merits". In these circumstances, "the judgment of the court as originally entered does not become final" until the action of the court on such petition, "and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, *supra*. In the *Bowman* case and each of the three cases it cites[27] the untimely petition for rehearing, although considered by the lower court, was denied. The problem presented in those cases was therefore more difficult than that raised here, in which the application to change the judgment was successful. It follows *a fortiori* in the latter situation that the entry of a different judgment extends the time to appeal.

Respondent may contend that the memorandum filed by the Commission requesting the change in the judgment was not in form a petition for rehearing. But the substance of the document, not its form or its title, and the manner in which the court treated it determine its legal effect. Respondent also argues that the Commission's memorandum did not request any change with respect to Part III of the judgment, and therefore cannot have the effect of a petition for rehearing on that point. But the critical fact is not what the Commission requested or the name of the paper in which the request was made, but that the docu-

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[27] *Voorhees* v. *John T. Noye Mfg. Co.*, 151 U. S. 135, 137; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 499; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137, 138.

ment filed by the Commission induced the court to enter a new and different judgment. The nature of the application is irrelevant when the judgment is changed—although it may be material when such an application is denied. A new judgment would be the basis for an appeal if the court acts on its own motion (*Zimmern* v. *United States*, 298 U. S. 167), and the result must be the same irrespective of a formal or informal request by a party.

Furthermore, the cases indicate that a petition for rehearing or its equivalent (such as a motion for new findings) extends the time to appeal with respect to all parts of a judgment, not merely the portion which the petition or motion seeks to have modified. Thus, in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177, the *plaintiff's* time to appeal was held to be extended by the *defendant's* motion to amend the findings—although the amendments to the findings did not relate to the portion of the judgment from which the plaintiff was appealing. Similarly, in *Johnson* v. *Eisentrager*, 339 U. S. 763, the Government's petition for certiorari was filed within 90 days of the denial of *respondent's* petition for rehearing below, not within 90 days of the original order. In *Reconstruction Finance Corporation* v. *Mouat*, 184 F. 2d 44, 48 (C.A. 9), the *defendant's* appeal pending disposition of *plaintiff's* motion for additional findings was dismissed as premature. In these cases the appellant or petitioner was not challenging the portion of the judgment or findings which

his opponent was seeking to have changed—and yet the time to appeal ran from the order disposing of the opponent's application. This shows that the time to appeal from an entire judgment was tolled by a motion addressed to part of it.

3. The obvious purpose of the rule that an amendment to a judgment or a petition to amend or modify a judgment tolls the time to appeal is to prevent separate and piecemeal appeals in a single controversy. Respondent's contention, however, could lead to just such segmentized litigation. For example, respondent itself might have sought review of the order enforcing Part II, in the absence of any showing of a prior violation of the order. Cf. *Federal Trade Commission* v. *Ruberoid Company*, 343 U. S. 470. Or, if the court had declined enforcement, the Commission might have sought review of that ruling. *Ibid.* In either situation, the rule contended for by respondent would require the filing of separate petitions governed by different time limitations to review issues arising out of a single order of the Commission—issues that had been considered and disposed of by the court below in a single proceeding. Such a result would flout the well settle judicial policy of avoiding the "inconvenience and costs of piecemeal review"[28] by combining "in one review all stages of the proceeding that effectively may be reviewed

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[28] *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 511.

and corrected if and when final judgment results." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546.

The purpose of statutes which limit the period for appeals is to set a definite time beyond which prospective appellees may know, if no appeal has been filed, that the litigation is over. *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, 415. In the instant case the litigation was not completed by the July judgment, and respondent was put on notice soon thereafter by the Commission's memorandum that further action was required by the court to terminate the case. Within 90 days after the July judgment the court entered its new judgment superseding the earlier one. Respondent was thus fully aware that the period for filing a certiorari petition had been accordingly extended.

We submit that the court below clearly intended to make its judgment of September 18, 1951, its final judgment in the proceedings before it; that the entry of that judgment fixed the time within which the petition for certiorari might be filed; and that the present petition, filed within 90 days of the entry of that judgment, was filed in time.

II

The Commission's Findings of Injury to Competition Were Fully Supported by the Evidence.

A. Introductory Analysis and Governing Principles

The industry involved in this case—the manufacture of automatic temperature controls for oil

burners—is, as respondents insist, a highly competitive one. Those who manufacture such controls, and the oil burner manufacturers who purchase them, seek to secure as much business as they can and to buy at the best prices they can, just like other businessmen. The unjustified discounts allowable under respondents' bracket system were plainly substantial, running in 1941 from 14 to 23% under respondents' highest manufacturers' price and 3 to 12% under the lowest justified bracket (R. 1659). The efforts of the oil burner manufacturers to obtain the lowest prices possible in buying controls (see *infra*, pp. 73-74) would lead most reasonable persons—as it has led the Federal Trade Commission—to conclude that there must be a material advantage in obtaining such lower prices, and a corresponding handicap to manufacturers who are forced to pay more than their competitors.

The one unusual feature in the controls industry is that one control manufacturer—the respondent, Minneapolis-Honeywell—for many years has been the dominant concern. In 1939, 1940 and 1941 it sold 60 per cent of the automatic temperature controls sold in the United States to oil burner manufacturers and dealers (R. 2241, 1645). This proportion had been reduced from 73 per cent, not by reason of any decline in respondent's sales (R. 877), which in fact increased 25 per cent in those years (R. 876-877), but because of a great increase

in the late 1930's in the demand for oil burners and the controls constituting their most expensive part (R. 2031). Moreover, the record shows that, because of public acceptance and demand generated by respondent's advertising and servicing policies, the majority of burner manufacturers found it necessary to use respondent's controls, at least as optional equipment, even at somewhat higher prices (R. 364, 429, 441, 473, 628, 648, 664, 685-686, 715, 728, 974-975, 995, 1045-1046, 1108, 1136-1137, 1141). Thus as a practical matter oil burner manufacturers cannot fully meet the demands of their customers by purchasing from respondent's competitors.[29]

The obvious consequence ~~is that, even~~ more than in other industries, the oil burner manufacturers forced to pay respondent substantially higher prices than their competitors would suffer a competitive disadvantage, for they could not entirely avoid purchasing respondent's controls. And the same factors which impel most oil burner manu-

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[29] Although respondent's cash prices were higher, purchasers from respondent were receiving, in addition to the physical controls, the advantages of respondent's servicing system and the consumer demand built up by respondent's advertising and other means of promoting good will (R. 858-861, 866, 995, 1046, 1108, 2242). Although the record does not disclose the comparative value of the facilities furnished by respondent's competitors, it certainly suggests that they did not match respondent in this respect. Vice President Sweatt of respondent testified that "So far as I know, the national advertising of any other control company has been very small." (R. 851).

facturers to buy M-H controls also make the quantity discount system more injurious to respondent's direct competitors than in other industries. For the customers' incentive to obtain respondent's controls at a lower price—not justified by cost differentials—by buying a greater quantity inevitably leads to smaller purchases from other control manufacturers.

These injurious consequences to competition, in the language of this Court in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46-47, "would appear to be obvious." Certainly a reasonable Commission could reasonably infer them from the undisputed facts in this case.

In reviewing the evidence in the succeeding pages (*infra*, pp. 63-83) we will show that even if the standard were "actual injury," it could not be said that the Commission's determination was erroneous, and that the evidence relied upon by respondent, in the light of the record as a whole, cannot be said to require a finding that competition was not injured by respondent's discriminatory price system.

But the Government's burden is not that heavy. For Section 2(a) of the Clayton Act prohibits a seller from discriminating in price between different purchasers of commodities of like grade and quality where the effect of such discrimination

> *may be* substantially to lessen competition or tend to create a monopoly in any line of com-

merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *. [Italics supplied]

And this Court has repeatedly held that "§ 2(a) does not require a finding that the discriminations in price *have in fact* had an adverse effect on competition."[30] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738, 742; *Morton Salt* case, 334 U. S. at 46; *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 356-357. "The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products* case, 324 U. S. at 738.

The proper test of injury to competition has been phrased in several ways. In the *Corn Products* case, on page 738, the Court stated, following the *Standard Fashion* case, "the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would *probably* have the defined effect on competition." Later in the *Corn Products* opinion (p. 742) the Court declared, "As we have said, the statute does not require that the discriminations must in fact

[30] All italics supplied unless otherwise noted.

have harmed competition, but only that there is a *reasonable possibility* that they 'may' have such an effect." The latter passage was repeated in the *Morton Salt* case (p. 46), although with the qualification that it "is to be read also in the light of" the statement on page 738 of *Corn Products* (334 U. S. at 46n). The dissent in *Morton Salt* (pp. 55-58) preferred the first formulation in *Corn Products* to the second.

The statutory phrase is "may be substantially" to lessen or injure competition. The various expressions used to define this concept have all properly held that although it excluded the remote effect on competition described as a "mere possibility," it did not require a certain or proved effect. The Commission had not thought that there was any material distinction between describing the intermediate effect which was sufficient to make a price discrimination unlawful as "reasonably probable" or "reasonably possible."[31] Indeed, the Commission recently has stated that it has been construing the Act as requiring a "reasonable probability" of injury to competition.[32]

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[31] The Brief for the Federal Trade Commission in the *Morton Salt* case stated: "This means that there must be a *probable or reasonably possible*; not a mere remote, effect on competition—but not a certain or proved effect" (p. 37). (Italics supplied.)

[32] A letter dated August 14, 1950, from the Chairman of the Commission in response to inquiries from the Chairman of the Senate Committee on Interstate and Foreign Commerce, printed in "Study of Federal Trade Commission Views on

Certainly for purposes of this case it will not matter whether the test is "reasonable probability" or "reasonable possibility." For whichever standard be applied, the proof before the Commission clearly satisfied it. Under any standard short of *actual* injury to competition[33] this case is a simple one, as we shall show.

The court below erred we believe, because it weighed the evidence in relation to proof of actual

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Freight Absorption", 81st Cong. 2nd. Sess., Confidential Print, page 8, contained the following question and answer:

> QUESTION 9: Does the Commission regard the words "may be" in section 2 of the Clayton Act, referring to the prohibited effect upon competition, as meaning that there is "reasonable possibility" or as meaning that there is "reasonable probability" of the specified effect? Explain answer.
>
> ANSWER: The meaning applied by the Commission to the words "may be" in section 2 of the Clayton Act has been that of "reasonable probability." The Commission is of the opinion that this construction, which has been many times sustained by the courts, permits the protection of competition from destruction or serious crippling by authorizing the institution of proceedings against price discrimination while injury to competition is in the incipient stage. If the Commission were obliged to wait until price discrimination has destroyed or severely crippled competition before a proceeding could be brought, the act would afford little protection. The Commission has not advocated, and does not now advocate, a different construction of the words "may be."

[33] We do not mean to imply that there was not sufficient evidence of actual injury here. See pp. 71-74, 77-79, infra. But the evidence as to this was in conflict, and a closer question would be presented.

injury. Although when stating its conclusion, the court did recite the test approved by this Court, its analysis of the evidence indicates that the court was not applying the rule of reasonable probability or possibility of injury to competition but was overturning the Commission's findings because, in its opinion, actual injury had not been proved. Thus the Court pointed out certain facts establishing that "competition *was* not injured"[34] (R. 2312); "we think it cannot be said that the effect of those practices was substantially to injure competition. And we construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate." (*id.*). With respect to customer competition the court below stated, "Even though some manufacturers did testify that 'the question of price was important * * * and that *they had lost* business to certain competitors who enjoyed lower control prices * * *' we think it is equally significant that other manufacturers who paid the higher prices *testified that they did not lose* business as a result of paying such higher control prices, and that they considered other factors of far greater importance in determining the price of the completed burner." (R. 2313). The court gave great weight to a survey that showed that some customers paying low prices for controls charged high prices for burners and *vice versa*, and concluded that this disproved

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[34] Italics herein are supplied.

any relationship between control prices and burner pricing (R. 2313-2314). Again the stress was on actual effect, not upon potential or probable or reasonably possible effect.

In the *Morton Salt* case the Court sustained the Commission's finding of actual injury to competition. The Court held, however, that such a finding was unnecessary, and significantly stated (p. 50):

> The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices. The evidence covers about two thousand pages, largely devoted to this single issue—injury to competition. It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

This case was tried and decided by the Commission prior to this Court's decision in *Morton Salt*, so that the Commission was unable to take advantage of the Court's suggestion that 2,000 pages of record were unnecessary to prove the obvious.

We submit and will show in the following pages that what was obvious in *Morton Salt* is also obvious here.

B. The Evidence Amply Supports the Commission's Finding That the Discriminatory Prices Will Tend to Injure Customer Competition

It is undisputed (1) that respondent charges some oil burner manufacturers substantially lower prices for its controls than it does other such manufacturers, and that the discriminations held unlawful are not justified by differences in costs, (2) that the controls are the most expensive parts of an oil burner, and (3) that oil burner manufacturers who received the unjustified discounts are in competition with manufacturers who do not.

In the paragraph just quoted, p. 55, *supra*, from the *Morton Salt* case, the Court stated that such a showing "in itself is sufficient" to support the Commission's inference of injury to competition.[35]

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[35] Respondent has conceded that proof of discrimination and competition makes out a *prima facie* case for the Commission. Br., in opp. p. 6. To the extent that this overlooks the requirement of substantiality, it goes somewhat further than the *Morton Salt* rule as stated by the Court and as interpreted by the Commission. But where a discount is substantial on its face, as in both the *Salt* case and this case, or where some

The Court had previously stated that it "would appear to be obvious that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay"[36] (334 U. S. at 46-47). The language quoted is equally applicable to the undisputed facts of the instant case.[37]

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other significant circumstance (such as the proportion which the controls bear to the cost of the completed oil burner) demonstrates substantiality, the Commission will have proved enough to support the "obvious" inference. This will not only make out a *prima facie* case, in the absence of testimony to the contrary, but will be enough to support an inference of substantial effect upon competition unless a respondent clearly proves that the industry is atypical. Although this was not spelled out fully in *Morton Salt*, we deem it to be the correct interpretation of that decision.

[36] The dissent also thought the "inference of adverse effect on competition" warrantable except for the one discount applicable only to 1/10 of 1% of the Salt Company's business. 334 U. S. at 60.

[37] The findings of the Commission with respect to customer competition were substantially identical with those in the *Morton Salt* case, as appears from the following comparison:

Morton Salt Findings, Transcript, No. 464, 1947 Term (R. 2088).	*Minneapolis-Honeywell* Findings (R. 2255).
The Commission further finds that customers of the respondent who receive the benefit of the various discriminatory prices, discounts, rebates, and allowances granted by the respondent have a substantial advantage in selling respondent's salt in competition with other customers of	The Commission further finds that oil-burner manufacturers who received the benefit of the various discriminatory prices, discounts, or rebates granted by the respondent have a substantial advantage in selling oil burners equipped with respondent's controls in competition

We do not doubt that a respondent before the Commission is free to try to prove that a particular industry is so unique that competition is not likely to be injured by reason of the fact that one competitor may pay less than another for the materials or parts which both use. But the burden is heavy on one seeking to establish a deviation suf-

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the respondent who do not receive the benefit of such discriminatory prices, discounts, rebates, and allowances or who are obliged to pay respondent's full price for said salt. In order to sell respondent's table salt in competition with customers of the respondent who receive the benefit of respondent's discrimination in price, wholesalers who pay respondent's full price or who are denied the discounts or rebates allowed such favored customers must either sell at competitive prices and in so doing reduce their possible profits by the amount of the discriminations against them, or attempt to sell at higher prices than those which the favored customers of respondent charge for the same product, with the result of inability to secure business and a reduction in the volume of their sales.

with other oil-burner manufacturers purchasing and using respondent's controls who do not receive the benefit of such discriminatory prices, discounts, or rebates and who are obliged to pay respondent's higher cost bracket price. In order to sell their oil burners equipped with respondent's automatic temperature controls in competition with customers of the respondent who receive the benefit of respondent's discriminations in price, oil-burner manufacturers who pay respondent's discount or higher bracket price or who are denied discounts or rebates allowed to such favored customers must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent charge for oil burners equipped with respondent's automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales.

ficient to prevent the Commission from reasonably drawing the inferences which, in the light of general knowledge, this Court has stated to be "obvious." This is not because of any rule of law but because the effort must be to prove that in the particular industry the usual economic forces are not operative. Nothing has been shown in relation to respondent's industry to prevent the drawing of the usual inferences. On the contrary, respondent's dominant position demonstrates that its price discrimination is more likely to harm competition than in other industries where no one producer controls the major share of the market.

No two industries, of course, are exactly alike in their competitive structure, and that is clearly true of the salt and temperature control industries. None of the differences upon which respondent relies, however, would lead reasonable men to believe that price discriminations were less likely to affect customer competition in one than in the other. In order to show that there is no basis for distinguishing this case from *Morton Salt* it seems advisable to take up the differences between the cases *seriatim.*

(1) First, however, there is one important differentiating factor upon which respondent does *not* rely. Although both the salt and the control industries are competitive, the former is not dominated by a single concern like respondent which conducts 60% of the business. Morton Salt Com-

pany was one of the larger producers and distributors of salt in the United States. Transcript in No. 464, 1947 Term, R. 7. But there was no suggestion that its position and power in the salt industry were comparable to respondent's in relation to automatic controls. Price discrimination on the part of a dominant manufacturer, larger than all others combined, whose product is practically a must for oil burner manufacturers, is much *more* likely to injure competition than the discrimination involved in the *Salt* case.

(2) The court below held that since controls constitute only one "of many factors" that determine the cost of burners, discriminatory differentials in the price of controls could not be said to injure competition, that a difference in the price of the controls would be too small to affect competition in the sale of oil burners. In this connection the undisputed facts that the manufacture of an oil burner is largely an assembling operation (R. 580-81, 594-6, 677, 725-6, 942, 1000) and that the controls are the most expensive items, constituting often as much as a third of the total cost (p. 10, *supra*), are highly relevant.

(a) The first answer is a statistical one. Respondent's discounts on the controls were as substantial, even in relation to the prices for finished oil burners, as the discounts in the *Salt* case. In *Morton Salt*, one of the discounts which this Court unanimously condemned was ten cents

per case off of the \$1.50 price for purchasers of over 5,000 cases in a single year. This discount amounts to 6 2/3%. Respondent's discount in 1941 in the brackets found to be unlawful (4, 4A and 5) ranged from 14 to 23% under the price in bracket 1. See p. 12, *supra*. In dollars and cents, price bracket 1 (\$17.35) was \$3.60 higher than price bracket 5 (\$13.75), and bracket 2 (\$16.45) was \$2.70 higher. The record shows that in 1941 the price of oil burners ranged from \$40 (R. 507, 684) up, that the minimum price to jobbers in many communities ran from \$45 to \$50 (R. 2141). The \$3.60 difference between the price of controls for oil burner manufacturers in respondent's brackets 1 and 5 constituted 9% of the total price of the oil burner sold at \$40, 8% of the price of those sold at \$45, 7.2% of those at \$50, and 6% of those at \$60. For the \$2.70 difference between brackets 2 and 5 the corresponding percentages for the completed oil burners were 6¾% at \$40, 6% at \$45, 5.4% at \$50 and 4.5% at \$60. These figures show that the percentage of the discounts on the controls to the price of the assembled oil burner roughly approximates the 6 2/3% discount on the salt in the *Morton Salt* case. The Commission certainly was not required to conclude that the discounts were so insubstantial that they would affect competition less in this case than in *Morton Salt*.

(b) A more fundamental answer also has its analogue in the *Morton Salt* case. As we have

seen, the oil burner is customarily assembled from a number of parts of which the most important are controls, motors, pumps, transformers and housing (R. 580, 594-6, 677, 725-6, 941, 1000). The prices of these together constitute the principal elements of the cost of producing the burner, the control being the most expensive part, about 40% of the total cost of parts (R. 940-944, 1000, 2252). If respondent's argument were sound, each part manufacturer could give substantial discriminatory discounts, and a manufacturer of oil burners would have a big advantage over his smaller competitors. Yet no one of the discounts could be said substantially to affect competition because that granted on each part would only be a small proportion of the price of the completed burner. The Commission properly rejected this contention, which would have the effect of taking a large number of manufacturers of assembled products out of the statute. As the Commission stated in its opinion (R. 2275): "Each seller who may have contributed to the aggregate price or cost advantages obtained by the favored burner manufacturers is, in part, responsible for the aggregate competitive result. The fact that the whole competitive effect cannot be traced to respondent alone does not relieve respondent of its share of responsibility * * *." Nor can respondent find exculpation for its injury to competition because similar injuries may have been inflicted by other suppliers who also gave discriminatory discounts.

A similar argument was rejected in *Morton Salt*. There the salt company argued that salt is a small item in most wholesale and retail grocery businesses, constituting less than ½ of 1% of the gross, and that a slight difference in the price of salt would not substantially affect competition in the grocery business. The Court stated, however (p. 49):

> There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

(3) The court below and respondent have relied heavily on evidence showing that oil burner prices have not varied in direct relation to the prices of controls. This was stipulated by the Commission at the commencement of the proceeding, when it agreed that *some* burner manufacturers paying higher control prices to respondent sold burners

for less than manufacturers paying lower prices, and *vice versa* (R. 1661). A statistical survey introduced by respondent, which concluded that "a chaotic price condition existed throughout the industry in 1941 * * * and that there was no definite pattern of either wholesaler or dealer oil burner prices" (R. 2135) proved the same thing—that *some* burner manufacturers paying low prices for controls sold oil burners at high prices, and that some manufacturers not receiving controls at the lowest price level were in the low-priced oil burner field. (R. Ex. 171, 1278, 2137-2141).[38]

The industry is divided between low and high priced burner manufacturers. Some of the former, including Quiet Heet, provide no servicing or credit facilities at all, and economize on advertising and selling expenses, *inter alia* (R. 569-572). The fact that some high priced burner manufacturers are among those who pay less for controls and *vice versa* does not prove that the manufacturers who pay less do not have a competitive

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[38] Since the exhibit gives only the high and low price for manufacturers in each area studied, a single manufacturer charging an excessively high or unusually low price could cause the table to give an exaggerated impression. The Commission has not questioned the conclusion that no precise mathematical relationship between control and burner prices has been proved. Even respondent's exhibit, however, reveals that in general the lowest priced burners were in respondent's Bracket 5, which pay the least for controls. The median, which seems to be the fairest method of averaging low burner prices in the areas covered by the survey, was $49 and $50 for Bracket 5 burners. The lowest median for any other bracket was $59.75 for Bracket 3. (R. 2137-2140.)

advantage. It shows merely that prices are affected by so many factors that the effect of no single one, such as the price of a part, can be segregated.

It is true that some manufacturers paying higher prices for controls may have absorbed the additional costs and thus reduced their profit margin; and others may have been able, because of manufacturing and distribution economies, to meet the prices of some of the competitors who paid less for controls (*supra*, p. 16). But this does not negate the Commission's finding of injury to competition. For, had these same manufacturers received the benefit of lower control prices, they could have sold their burners at an even cheaper price. This, in turn, would have led either to a larger volume of sales, or to a greater profit if the volume remained constant. And, if they did not reduce their burner price, they would have made a larger profit on each unit sold.[39] Furthermore, if

[39] The House Committee Report (H. Rep. No. 2287, 74th Cong., 2d Sess.) shows that Congress assumed that price discriminations would generally involve an element of loss, and that these might appear in a reduction of profits. The Report (p. 8) stated in this connection:

> Discriminations in excess of sound economic differences between the customers concerned, in the treatment accorded them, involve generally an element of loss whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them.

See to the same effect the statement of Senator Logan, explaining the proposed legislation to Congress. 80 Cong. Rec. 3113.

[Continued]

the beneficiaries of the lower controls prices did not pass the difference on to customers, they could strengthen their own competitive position by reinvesting the savings in their business or providing more service.

Competitors are equally injured whether they absorb higher costs and thus operate on a smaller margin of profit, or maintain their profit margin but reduce their volume by passing the higher costs on to customers. See notes 10, 39, pp. 11-12, 65, *supra*. Since controls constituted the largest cost item in a burner, the substantial discounts enjoyed by manufacturers in the lowest price brackets obviously gave them a substantial economic advantage over their less favored competitors.

The record shows that some high priced burner manufacturers believed that the price differential on controls was an important factor in their capacity to compete with the low priced manufacturers (*e.g.*, R. 535, 539). Certainly the insistence by most burner manufacturers upon the lowest possible prices for controls implied that they felt low prices were advantageous and high prices a handicap in the competitive struggle. And the record contains examples of the direct relationship be-

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* Moreover, the knowledge that the favored manufacturer was enjoying lower control prices would tend to restrain competitors from reducing their prices, since the differentials would give the favored manufacturer a distinct advantage in any retaliatory price competition it might inaugurate.

tween the prices charged particular customers for controls and the prices charged for oil burners. *E.g.*, Williams Oil-O-Matic, Statement, pp.19-20, *supra*. The fact that particular oil burner manufacturers may have compensating advantages because of other factors and other methods of operation does not, of course, mean that they do not suffer a disadvantage because they pay more than their competitors for controls.

The fundamental weakness in respondent's contention, however, is that it applies the wrong test. Even on the assumption that respondent has proved that oil burner prices do not bear a direct relationship to the discounts on the controls, the Commission's order must be upheld. For the evidence need only be strong enough to show a reasonable probability or possibility that competition might be harmed, not that it has been. See *Corn Products* and *Morton Salt* cases, discussed *supra*, pp. 51-52. Indeed, in the *Morton Salt* case the Court admonished the Commission not to waste time proving the actual effect upon competition.

In the *Corn Products* case a similar contention as to the absence of proof of actual effect was made with respect to the special allowance of 50 and 75 cents per ton granted certain purchasers of gluten feed and meal.[40] The parties stipulated, and the Commission found, that the allowances in question were "'sufficient' if and when reflected in whole or in substantial part in resale prices, to

[40] See Transcript, No. 680, 1944 Term (R. 186-191).

attract business to the favored purchasers away from their competitors, 'or to force [their] competitors to resell ... at a substantially reduced profit, or to refrain from reselling.'" (324 U.S. at 742). It was argued, however, that "*there is no evidence that they ever were so reflected*[41] in the resale prices at any time during the entire period of years during which the contracts were in effect," "that this conclusively negatives the possibility of a finding that the reasonably probable effect of the contracts and the allowances or discounts thereunder, was a substantial lessening of competition * * *", and that "had such recipients cut their prices, it might, perhaps, have been a proper subject of inference * * *" (Br. for Resp., pp. 70-71). In rejecting this contention, the Court said:

> This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition. [324 U. S. at 742.]

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[41] Italics in original.

Respondent cannot distinguish the gluten feed situation on the ground that the discount there was more substantial since the resale of a single product and not of a part was involved. The record in the *Corn Products* case (No. 680, 1944 Term, R. 391-4) shows that the prices per ton for gluten feed and meal ranged from $15 to $43. The fifty and sixty-five cent discounts, therefore, would range from 3-1/3 to 1.16 per cent and from 4½ to 1.5 per cent of the total. As we have seen, the discounts on the controls in the instant case constituted a substantially greater percentage of the price of the completed oil burner. See pp. 60-61 *supra*.

4. Respondent also relies upon the testimony of certain burner manufacturers who stated that they were not injured by the fact that others paid less for M-H controls. The court below noted that some manufacturers so testified, and that others testified to the contrary (R. 2313, quoted at p. 54, *supra*). Of the six manufacturers who testified that their burner sales were not injured because other manufacturers were paying less than they were for respondent's controls (R. 938, 951-3, 999, 1087, 1142, 1151, 1174) five produced a higher priced burner (R. 946, 997, 1086, 1141, 1152). Four of these explained his somewhat unusual statement on the ground that he had compensating advantages, such as superior quality and servicing (R. 1003, 1087, 1142, 1152-1153), which meant, of

course, that he was selling a burner plus services or had other compensating elements which tended to reduce the injury. The fifth, because of operating economies and low distribution and selling costs, was able to achieve savings "which put us on practically even footing with any of our competitors" (R. 953). The sixth, in the low priced field, testified that he was not harmed by the differential because he was already operating at capacity (R. 1174). These explanations, while undoubtedly truthfully reflecting the witnesses' opinions, do not prove that they would not have been in an even better position *vis a vis* their competitors if the latter were not paying less for controls. And even assuming the accuracy of the witnesses' analyses of the effects upon their particular businesses, the statements are far from proving that other burner manufacturers were not harmed by respondent's price discrimination, or that competition was not injured.[42]

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[42] The House Committee Report (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 8) stated with reference to the competition clause of the Robinson-Patman Act:

> This provision accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result. [Continued]

The fact that other witnesses expressed contrary opinions in itself goes a long way to refute any notion that the testimony just described portrayed the typical or generally prevalent situation. Thus, Gillis of Malleable Iron Fitting Company, a high priced manufacturer, testified that the lower prices enjoyed by its competitors made it "more difficult" for it to compete with them "because our prices were higher" (R. 535). Malleable had to lower its prices "as far as we were able" to meet that competition (*ibid.*). He stated further that respondent's price policy gave some manufacturers "a decided disadvantage in trying to compete with some of the cheaper ones because of the larger volume" (R. 539).

Rodler of Oil Equipment Corporation testified that (R. 578-579) "a lot of sales * * * could be made without controls. * * * The major cause as far as I know is that we had to ask too much for the controls that we sold with the burner and that they liked our burner better, but could buy the controls in the market cheaper than we could sell them to them." He subsequently stated that though a $2.65 difference in the price of controls "would not have made the difference necessary"

The Senate Report (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 4) uses substantially identical language, and adds to the last sentence quoted the significant phrase "and to catch the weed in the seed will keep it from coming to flower."

to met Quiet-Heet's competition "it would have made part of the difference but not enough" (R. 582), and again "if you put $2.70 plus a few other items down the line you would have the collective difference" (R. 593). The comparison with Quiet-Heet was with the lowest price competitor, $2.70 might have made a difference in competing with higher price buyers who still were in respondent's low priced brackets.

Herr of Herco, though unable to determine "the effect in dollars and cents", stated that the lower control prices paid by Quiet-Heet "made a big difference" on the business of Herco Oil Burner Corporation in the New York area, and resulted in Herco's failure to secure "some business" (R. 673-674, 676).

Stauffer of Penn Boiler and Burner Manufacturing Company testified that they had a "ten-year fight" with respondent over the fact that they were paying more for controls than some of the competitors (R. 687; Comm. Exs. 205, 206-A, R. 1987-1989). The higher prices it paid respondent for controls precluded it from offering burners with respondent's controls at the same price as those with Mercoid controls, as its competitors were doing (R. 681). In order to compete, Penn Boiler purchased complete burners equipped with respondent's controls from Quiet-Heet, removed

the controls, and used them on its own burners (R. 682-3, 685-6, 690).[43]

There was other, more general, testimony as to the importance of price. An M-H memorandum itself revealed the importance of $1 in the price of controls (Comm. Ex. 35-B, R. 1804):

> Brannon said their lowest price on their burner was $53.50 and that they sold a lot of them at $55.00 and on these jobs he said there was not enough margin to take care of $1.00 difference in controls. On the other hand, he said where they were getting $60.00 or $65.00 for a burner, the $1.00 difference was not too serious * * *.

Shields of Nokol testified that although he did not worry about what Quiet-Heet was doing, they "naturally" got some business from him because "a lot of peope buy on price only" (R. 1126). Many companies, including Quiet-Heet when in the lowest bracket (R. 504), kept insisting that they should be given a better price, obviously because such a price would be advantageous to them

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[43] Stauffer wrote respondent in 1940 (R. 1988-1989):

> In checking over the prices quoted some dealers who handle our boilers and competitive burners, we find that they can buy oil burner controls cheaper than we can with the results that on this basis it would be practically hopeless for us to sell them controls. In fact comparing our dealers' prices with your prices to us, we could still purchase controls cheaper from our own dealers than from you.

(R. 316-318, 320, 351, 622, 676, 786, 969, 1005, 1537, 1539, 1544, 1547-1548; Comm. Ex. 24-A, R. 1785-1786, Comm. Ex. 34, R. 1801-1802; Comm. Ex. 75-B, R. 1829). Indeed respondent itself objected when burner manufacturers charged $5 more for burners with M-H controls (R. 433-4, 965, 1046-7) —presumably because this would reduce the sales of such burners.

This testimony supports the Commission's finding that the discriminatory prices charged by respondent actually injured competition. The fact that some competitors testified that they were not hurt does not prove the contrary; they did not testify that others were not hurt, or even that a substantial portion of the industry was not. Certainly when the record as a whole is considered, it cannot be said that it does not support the Commission's finding that the discriminatory prices have tended "to substantially lessen [and] injure * * * competition between respondent's customers" (R. 2260). The record thus amply satisfies the test of reasonable probability or possibility, which is all that the statute requires the Commission to meet. On the record as a whole it is clear that respondent has not proved that the controls industry was sufficiently different from the salt or other competitive businesses to preclude the Commission from drawing what this Court has termed to be the "obvious" inference from respondent's discriminatory pricing system.

C. The Court Below Improperly Set Aside the Commission's Findings of Injury to Competitor Competition

1. *There was sufficient evidence to support the Commission's finding of injury to competitor competition.*

Section 2(a) of the Clayton Act prohibits price discriminations which may injure competition between the seller and its competitors, as well as among its customers. A finding of injury at either competitive level is sufficient to support a cease and desist order prohibiting the discriminatory pricing practices. The Commission's order in the instant case was based upon findings of injury to competitor competition, as well as to competition among respondent's customers.

As previously noted (*supra*, pp. 50-53), violation of Section 2(a) does not require a showing that the discriminatory prices actually have injured competition. It is sufficient that there be a reasonable probability that they may have done so. The evidence before the Commission clearly established that there was more than such a probability of injury to competitor competition in this case.

As has been pointed out (*supra*, pp. 10-11, 49), public demand for respondent's controls compelled most burner manufacturers to have such controls available as either regular or optional equipment on their burners (R. 364, 429, 441, 473, 628, 648, 664, 685-686, 715, 728, 974-5, 995, 1045-1046, 1108, 1136-1137, 1141, 1152). Since under

respondent's pricing system the price of controls dropped as the volume purchased increased, the inevitable tendency of respondent's system would be to encourage burner manufacturers, most of whom found it necessary to buy some controls from respondent, to concentrate their purchases in respondent as the single source of supply. As the Commission stated in its opinion (R. 2271):

> When an oil burner manufacturer sees that his total control requirements, if concentrated with respondent, will entitle him to a bracket 4 price, for example, but if divided among other sources of supply he may receive only a bracket 2 or a bracket 3 price, the competitive tendency of the discriminatory bracket 4 price is apparent. The very nature of quantity price differentials is to divert business to the seller granting such differentials * * * .

In fact, one burner manufacturer apparently bought more controls from respondent than it needed in its own business and sold the excess on the open market, in order to obtain respondent's lowest prices on its own control requirements (Comm. Ex. 133, R. 1882, R. 579, *supra*, p. 20).[44]

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[44] This practice also injured other burner manufacturers who were compelled to sell their own burners without controls and thus lose their usual profit on the controls (*supra*, n. 17, p. 20; R. 583).

Clearly, the Commission's finding that the price discriminations had the "capacity and tendency" to induce the purchase of respondent's controls and had tended to divert trade to respondent from its competitors (R. 2256) represented a "reasonable inference" from the facts before it. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 742; *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149, 152.

Moreover, the record shows not only that respondent's practices created a reasonable possibility of injury to competitor competition, but that they had caused actual injury. The Commission findings to that effect (R. 2256)—although not necessary to support its order—have ample evidentiary support. Respondent's competitors lost a substantial volume of business to it (*supra*, pp. 22-24). One competitor, for example, lost a particular sale because it would have "cost money" for the purchaser if he had failed to purchase a sufficient quantity of respondent's controls to obtain a retroactive discount; "it would cost us money if we divided our business", he testified (R. 150-151, 984). In another case an oil burner manufacturer wrote respondent that if it was given a lower price "we will go 100 percent with you, and eliminate the other two makes of controls that we have been selling" (Comm. Ex. 75-B, R. 1829).

Respondent itself was well aware that purchasers would often have to cease buying from competitors if they were to secure respondent's lowest prices. Thus, a letter from the vice president of respondent to the Timken Company stated (Comm. Ex. 68, R. 1816):

> Frankly, in view of your recent decision to divide your control requirements with another manufacturer the writer wonders, even in view of your increased sales, if your requirements from us will reach the total of 40,000 units on which your present price is based.

Another letter, from respondent's sales manager, said (Comm. Ex. 34, R. 1802):

> Of course, price has been the stumbling block, and John and I agreed that we would be willing to go to a Bracket V basis if Anchor Post would assure us of the business. * * * If Anchor is going to adopt a policy of splitting their business, I don't think we are going to be able to get very far with them.

Respondent wrote Cleveland Steel Products Company (Comm. E. 74-A, R. 1825): "If you could standardize on our constant ignition controls it would go a long way toward obtaining the lower prices". In another year the same company wrote respondent that it had been paying a higher price (Comm. Ex. 107-B, R. 1854-1855):

> because of your assurance that our prices beginning with 1940 will be the equal of the lowest prices quoted in the Oil Burner Industry and, in return for this, we anticipate giving you our business 100% and doing all within our power to greatly increase our volume of business with you as a whole.

Certainly, a pricing system which would induce customers to seek a discount unjustified by costs by giving 100 percent of their business to a company which already was in possession of 60 percent of the national market, instead of dividing their business with other manufacturers, would tend substantially to injure competition, as the Commission found.

The court of appeals, however, held that the evidence did not sustain the Commission's finding of actual or potential injury to competitor competition. We believe the court reached this conclusion in part because it was applying the erroneous test of actual, not probable or possible, injury to competition, a matter discussed at pp. 50-55, *supra*. Apart from this the court seems plainly to have improperly substituted its judgment as to the weight of the evidence for that of the Commission—and in doing so has demonstrated its lack of familiarity with the economic problems committed by Congress to the administrative body. The evidence summarized above

(pp. 75-79, *supra*) shows that the Commission's judgment as to the effect of discriminatory prices upon respondent's competitors was an entirely reasonable one.

The court below gave great weight to the facts that there was keen competition among control manufacturers, that respondent's prices were higher than its competitors', that competitors of respondent enjoyed a substantial growth during this period, that respondent's relative share of the market declined from 73 per cent in 1937-1938 to 60 per cent in 1939-1941, and that in 1941 respondent lost some of the business of some of its customers to its competitors (R. 2312). These and similar facts, the court stated, "fully establish" the examiner's finding that competitor competition had not been injured, and "outweigh the facts relied upon by the Commission in reaching the opposite conclusion" (*ibid.*). The court recognized that respondent "did succeed in retaining or diverting some business which might otherwise have gone to some of its competitors," but concluded that in view of the competitors' growth despite respondent's commanding position and "alleged wrongful practices," such practices cannot be said "substantially to injure competition" (*ibid.*).

The facts thus singled out by the court below, however, were but part of the record before the Commission when it made its decision. The

reaching of that decision required an evaluation of the effect of respondent's discriminatory practices upon competition in the light of all the data before the Commission. The record showed that respondent for many years had been, and during this period continued to be, the major producer in the industry. The fact that other firms have grown substantially, or that new ones entered the field, does not negative the deleterious effects of respondent's discriminatory prices on competition. Had respondent not interfered with normal competitive processes through its discriminatory pricing system, its competitors presumably would have grown even faster, and respondent's share of the market would have declined even further. The court's reference to respondent's loss of some sales to competitors and to the decline in its percentage of the market should not be taken as meaning that it was losing business. To the contrary, between 1939 and 1941 its sales increased over 25 per cent, from 159,000 primary controls to 201,000 (R. 877).[45] As the Commission pointed out, after considering all of these facts, "* * * the law does not permit respondent to resort to unfair or discriminatory practices in order to maintain its competitive posi-

[45] A temporary drop in 1938 had come about because "the bottom dropped out from the oil burner business in the last quarter of 1937," and "many of our customers at the start of 1938 found themselves quite heavily loaded with inventory" (R. 876).

tion in the industry" (R. 2273). Competition may be adversely affected whether the discriminatory practice result in the retention of customers that competitors otherwise would acquire, or in the diversion of customers from such competitors. *American Can Co.* v. *Ladoga Canning Co.*, 44 F. 2d 763, 767 (C.A. 7), certiorari denied, 282 U.S. 899. The natural effect of competition would be the shifting of a certain volume of business among competitors; what the Act condemns is the artificially-induced diversion of trade resulting from the discriminatory prices given by respondent.[46]

The fact that respondent's prices are higher than its competitors' does not prove that competitors were not injured by the price discrimination. On the contrary, this would seem to establish respondent's dominance in the industry, for without

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[46] In support of its conclusion that respondent's pricing system resulted in injury to competitor competition, the Commission also referred to respondent's own argument that the discriminatory prices were made to meet competition (R. 2273). This contention, the Commission stated, showed that respondent's discriminatory prices were made to retain or secure the business of certain customers, and that they were "largely successful" in doing so (*ibid.*). However, the effect of such price discriminations on competition is in no way related to whether they meet the statutory defense of good faith attempts to meet a competitor's lower price (see *infra*, pp. 89-94). The two questions are separate and distinct, and evidence which is insufficient to satisfy the statutory defense nevertheless may be extremely significant in determining the effect of the discriminatory practices upon competition.

such dominance respondent could not retain 60 per cent of the business and charge higher prices. In any event, the purchasers apparently regarded respondent's controls as worth the extra cost in view of their reputation and the services which accompanied them (R. 851-860). The purchasers were thus in their own view receiving more than the bare product.

The court of appeals gave undue weight to the facts relied on by respondent and not enough to those which supported the Commission. But in this field the function of evaluating the evidence and drawing the appropriate inferences therefrom has been primarily entrusted to the Commission as an expert body with a staff versed in the analysis of the economic matters we have discussed. A court is not warranted in overturning Commission inferences which are entirely reasonable—in this case, we submit, more so than those of the court—in the light of the record as a whole. As this Court stated in *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U.S. 67, 73:

> * * * what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertainties and conflicting inferences. Statute and decision * * * forbid that exercise of power.

2. *The court of appeals gave undue weight to the findings of the trial examiner.*

The court below also seems to have misunderstood this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, with respect to the significance to be accorded a trial examiner's report when the agency does not follow the examiner's recommendations. In the *Universal Camera* case, this Court held no more in this connection than that in deciding whether an agency's findings are supported by substantial evidence, the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) requires reviewing courts to look at the whole record, not just at those portions sustaining the agency action, that the "whole record" includes the trial examiner's report, and that the examiner's report should be given "such probative force as it intrinsically commands" (p. 495). The Court further pointed out that "the significance of his report, of course, depends largely on the importance of credibility in the particular case" (p. 496).

Questions of credibility were of as great importance in the *Universal Camera* case as they are unimportant here.[47] The significant differences

[47] We do not regard the fact that some oil burner manufacturers testified that the greater discounts on controls allowed competitors did not affect their business while others testified to the contrary as raising an issue of credibility. See pp. 69-

between the Commission and the examiner here were not as to credibility or in findings as to specific facts, but in conclusions or inferences, mainly of an economic nature.[48] The examiner is in no better position to decide such issues than the Commission; the fact that he heard the testimony rather than read it does not give him an advantage in analyzing economic effects. The determination of such matters has been entrusted by Congress to the Commission, presumably because the Commission's judgment was thought to be more expert than an examiner's.

This Court did not suggest in *Universal Camera* that the reviewing court is to substitute the examiner's decision for that of the agency whenever it concludes that the examiner's recommended findings are themselves supported by substantial or even (in the reviewing court's opinion) a preponderance of the evidence. On the contrary,

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73, *supra*. Each was testifying to the effect upon his particular business as he saw it. The Commission could credit all this testimony, and conclude, as it did, that a substantial portion of the industry was harmed by respondent's pricing system. This is the only issue as to which there can possibly be said to be a conflict of testimony.

[48] For example, the examiner found that it was the cutting of oil burner prices by Quiet-Heet, not the price paid for controls, which caused some competitors to lose business (R. 2194). But obviously Quiet-Heet's price advantage on controls was one factor, which, *pro tanto*, permitted it to sell burners for less than its competitors. The Commission's difference with the examiner was with respect to the economic analysis, not the underlying facts.

this Court in *Universal Camera* specifically rejected the "notion" that the agency "has power to reverse an examiner's findings only when they are 'clearly erroneous,'" a "notion" that the Court held would be "wholly inconsistent" with the "responsibility for decision" placed upon the agency by the statute which it administers (340 U.S. at 492).[49]

Yet the court below appears to have given primacy to the examiner's conclusions in reviewing the substantiality of the evidence relating to competitor competition. Prior to discussing such evidence, the court stated that from its examination of the "record as a whole" it was "convinced that the findings of the examiner were supported by very substantial evidence" (R. 2311). After summarizing "various undisputed facts" relating to competitor competition—but omitting the facts relied on by the Commission (see pp. 80-83, *supra*)—the court said (R. 2312):

> The foregoing facts fully establish the examiner's finding that competitor competition was not injured * * * and they outweigh the facts relied upon by the Commission

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[49] Section 11 of the Clayton Act provides that:

> If upon such hearing the commission * * * shall be of the opinion that any of the provisions [2, 3, 7 and 8] have been or are being violated, it * * * shall issue * * * an order requiring such person to cease and desist from such violations * * *.

> in reaching the opposite conclusion. And while the findings of an examiner are not "as unassailable as a master's" (*Universal Camera Co.* v. *National Labor Relations Board*, 340 U.S. 474, 492), where it appears from the record that they are supported *by a preponderance of the evidence,* the action of the Commission in rejecting them is arbitrary. [Italics supplied.]

The question before the reviewing court was whether the Commission's findings were supported by substantial evidence on the record as a whole, not whether the court agreed with the examiner rather than with the Commission. The Commission, of course, must decide the case in accordance with the preponderance of the evidence, as it sees it. But the fact that it may disagree with the trial examiner in applying this standard does not mean that the reviewing court may reverse because it agrees with the examiner. For the court would then be completely substituting its judgment for that of the Commission as to the weight of the evidence, determining preponderance for itself whenever the examiner was reversed, not weighing for substantiality on the record as a whole. Nothing in the Administrative Procedure Act or the *Universal Camera* case declares or implies that the scope of review was to be so greatly broadened whenever an agency disagreed with its examiner.

It is axiomatic that in Section 2 (a) proceedings, "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 739; *Federal Trade Commission* v. *Staley Manufacturing Co.,* 324 U.S. 746, 760. The *Universal Camera* case did not change this standard. The effect of particular pricing practices upon competitive conditions in a complex industry would appear to be a matter particularly within the Commission's expert competence. See *Bruce's Juices* v. *American Can Co.,* 330 U.S. 743, 746. The weight given to the examiner's report by the court below, however, would in effect vitiate the agency's exercise of its own independent judgment on the matter, a judgment based on the entire record before it and its special knowledge in the field. If the agency's function were limited to reviewing the examiner's recommendations to determine whether they were supported by substantial evidence, the public in large measure would be deprived of the benefits of the administrative expertise which is the very *raison d'etre* of the agency's existence. We submit that neither the Administrative Procedure Act nor the *Universal Camera* decision intended thus to subvert the agency's normal independent adjudicatory functions into a mere appellate review of the examiner's conclusions.

This criticism is particularly pertinent where, as here, the evidence did not require the Commission to resolve conflicting testimony as to disputed factual matters. Where there is such conflict, the examiner's opportunity to appraise the credibility of witnesses will entitle his recommendation to substantial significance. Cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S., at 496. In the instant case, however, the Commission's decisional process involved the drawing of inferences from uncontradicted facts as to their effect on competition.

For the reasons stated, this Court is not called upon to decide whether it agrees with the examiner or with the Commission as to the preponderance of the evidence—although we believe that the Commission's findings were the more reasonable. The arguments advanced in the preceding pages in support of the reasonableness of the Commission's decision demonstrate that it had sufficient basis for overruling its examiner.

III

Respondent's Discriminatory Prices Were Not Made in Good Faith to Meet an Equally Low Price of a Competitor.

The court of appeals did not pass upon the question whether respondent had justified its quantity discounts in the three lowest price brackets by an adequate showing that such differentials were made in good faith to meet an equally low price

of a competitor. We recognize that ordinarily this Court will not consider such a question in advance of a decision thereon by the lower court. However, the Court recently has indicated that where the only remaining issues in a case involve questions of law "not calling for examination or appraisal of evidence," it will decide them itself rather than remanding the cause to the court of appeals for further proceedings. *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 214; *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 473-474. Since we believe that this question raises a matter of law that can be resolved without "examination or appraisal of evidence," and is one whose resolution in our favor will be dispositive of the issue with respect to meeting competition, we urge the Court to consider and decide the question together with the other issues in the case in order that this already prolonged litigation may come to an end.

The Commission, in rejecting respondent's defense that the three lowest price brackets constituted good faith attempts to meet the lower price of a competitor, pointed out that these brackets did not "represent prices made in particular instances to meet competitors' prices, but reflect progressive reductions in a comprehensive price schedule based on increased quantity purchases" (R. 2272). We submit that the decision in *Federal Trade Commission* v. *Staley Manufacturing Co.*,

324 U.S. 746, makes it abundantly clear that the defense of meeting competition cannot serve to justify a discount system whereunder the discriminatory discounts are given to all customers who purchase a given volume without regard to their individual competitive situations.

In the *Staley* case, the Commission, in holding that respondent's basing point delivered price system resulted in illegal price discriminations in violation of Section 2(a) of the Clayton Act, had rejected respondent's contention that the price discriminations had been made in good faith to meet a competitor's equally low price. In sustaining this conclusion by the Commission, the Court pointed out that Section 2(b)

> does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition [p. 753]

The Court further noted that the statutory test in Section 2(b)

> presupposes that the person charged with violating the Act would, by his normal, nondiscriminatory pricing methods, have reached

a price so high that he could reduce it in order to meet the competitor's equally low price. * * * Respondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing system which, in their case, resulted in systematic discriminations * * * [pp. 754-755]

Although the Court in *Staley* was dealing with a basing point pricing system, its reasoning and language are equally applicable to the quantity discount pricing system followed by respondent. Respondent's system of fixing bracket prices solely on the basis of quantities purchased, without regard to whether particular customers falling within those brackets were in fact receiving more favorable treatment from a competitor, has been in use since respondent was organized in 1927, and was employed by one of its predecessor companies at least as far back as 1924 (R. 1017-1018). Thus the system was in operation at a time when two of respondent's three principal competitors had not yet entered the controls business (*supra*, n. 11, p. 12). Just as in the *Staley* case, respondent has "never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition." (324 U.S. 754-755). On the contrary, respondent has from the very beginning "slavishly followed

* * * a pricing system [here its own] which * * * resulted in systematic discriminations" (*ibid.*).

It is true that respondent's sales manager testified that in establishing its annual price schedules, the prices of competitors were "a vital factor" (R. 1020-1021, 1567, 1774). The following colloquy shows, however, that respondent was only taking into account the general competitive picture, not meeting a particular price or price schedule (R. 1021):

> Q. Hasn't it been your experience that your competitors would wait and see what you were going to do in the way of brackets and prices before they get out their brackets and prices?
>
> A. Oftentimes that would happen.
>
> Q. Well, didn't that usually happen?
>
> A. I couldn't say as to that. I know that we always endeavored to have our prices set up very early in the year or late the previous year because the manufacturers were all getting out their price sheets and their literature and it was quite a convenience for them if we could have our price data in their hands early, and when our prices were figured and our quantities were set, we issued our prices.
>
> Now, competition may have followed or they may have been in ahead of us, I don't know.

In this connection the examiner found.[50] (R. 2193):

> Respondent's bracket prices (Paragraph 4) for any given contract year were set up according to information respondent had at the time in reference to the general business situation, trends in the market, information as to prices of competitors gathered by respondent from its salesmen, and in other ways, and the general competitive situation existing at the time.

Competitive prices were thus only one of a number of factors considered by respondent in establishing its price schedules.

Obviously, all pricing systems are adopted and operated in the light of the general price policies of competitors. But Section 2(b) does not permit "a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 725. Section 2(b) relates solely to price discriminations made to deal with particular competitive situations, and not to entire pricing systems.

We accordingly submit that the three lowest price brackets in respondent's quantity discount

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[50] No exception was taken to this finding.

[51] Similarly, respondent's granting of off-scale prices cannot be justified as good faith attempts to meet a competitor's

system cannot, as a matter of law, be justified as good faith attempts to meet an equally low price of a competitor.[51]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the cause remanded with instructions to affirm Part III of the Commission's order.

Respectfully submitted,

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lower prices. As the Commission pointed out, respondent's evidence connecting the off-scale prices to particular customers' competitive situations dealt with only 22 of the 76 off-scale accounts, and was not conclusive as to several of them (R. 2257-2259). The Commission further found that even if respondent had met a competitor's lower price in all of the 22 accounts, that fact would not justify respondent's general practice of allowing off-scale prices (R. 2259).

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